Supreme Court, U.S.
FILED

09-648 DEC 01 2009

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No. 09-_____

In the Supreme Court of the United States

JAMES MINCOFF,
Petitioner,

- v -

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NINTH CIRCUIT COURT OF APPEALS

Petition for Writ of Certiorari

CHARLES M. SEVILLA
Law Office of Charles Sevilla
1010 Second Ave., Suite 1825
San Diego, CA 92101
Telephone: (619) 232-2222

Counsel for Petitioner Mincoff

QUESTIONS PRESENTED FOR REVIEW

1. Under Brady v. Maryland, 373 U.S. 83, 87 (1963), what are the standards for an in camera review of a central prosecution witness's multiple pre-trial debriefing statements, some of which were admittedly false, but never shown to petitioner?

2. May federal drug conspiracy and attempted distribution convictions be predicated on mere repeated and futile requests to buy contraband?

TABLE OF CONTENTS

Questions Presented for Review i

Table of Authorities iv

Petition for a Writ of Certiorari 1

Jurisdiction 1

Constitutional and Statutory Provisions 1

Reasons for Granting Certiorari 2

Statement of the Case 7

A. District Court Proceedings 7

B. Statement of the Facts 8

1. Prosecution Case 8

ARGUMENT 13

I. BECAUSE THE COURTS OF APPEAL ARE CONFLICTING ON THE STANDARDS FOR IN CAMERA REVIEW OF PROSECUTION WITNESS PRE- TRIAL STATEMENTS UNDER BRADY V. MARYLAND, REVIEW BY THIS COURT IS WARRANTED TO SETH FORTH STANDARDS TO ASSURE COMPLIANCE WITH DUE PROCESS. 13

A. Components of a Brady v. Maryland Showing. 13

B. Upon the Prosecution Refusal to Turn Over Debriefings, In Camera Review is Mandated to Assure Brady Compliance. . . 14

C. Petitioner Made A Plausible Showing for In Camera Inspection 19

D. Review Should Be Granted to Resolve the Question Presented 24

II. CONSPIRACY AND ATTEMPTED DISTRIBUTION CONVICTIONS CANNOT BE PREDICATED ON MERE REPEATED REQUESTS TO BUY CONTRABAND. 26

A. A Request to Purchase Is Not A Federal Conspiratorial Agreement. 26

B. Even a Buy-Sell Agreement Where All Essential Terms Are Settled by Two Parties is Not a Federal Conspiracy. 29

CONCLUSION 35

EXHIBITS

July 31, 2009 Opinion of Circuit Panel Appendix A-1
[U.S. v. Mincoff, 574 F.3d 1186 (9th Cir. 2009)]

September 8, 2009 Order Denying Rehearing & Rehearing En Banc . . . . . Appendix B-1

TABLE OF AUTHORITIES
FEDERAL CASES

Anderson v. United States, 788 F.2d 517 (8th Cir. 1986) 17
Banks v. Dretke, 540 U.S. 668 (2004) 25
Black v. United States, 129 S. Ct. 2379 (2009) ... 5
Brady v. Maryland, 373 U.S. 83 (1963) .... *passim*
Direct Sales Co. v. United States, 319 U.S. 703 (1943) 32
Gebardi v. United States, 287 U.S. 112 (1932) 6, 29
Giglio v. United States, 405 U.S. 150 (1972) 13
Grunewald v. United States, 353 U.S. 391 (1957) 28
Iannelli v. United States, 420 U.S. 770 (1975) 6, 29
Krulewitch v. United States,336 U.S. 440 (1949) 35
Kyles v. Whitley, 514 U.S. 419 (1995) 14
Love v. Johnson, 57 F.3d 1305 (4th Cir. 1995) ... 16
McBoyle v. United States, 283 U.S. 25 (1931) 5
N. Mariana Islands v. Bowie, 243 F.3d 1109 (9th Cir. 2001) 19
On Lee v. United States, 343 U.S. 747 (1952) ... 23
Pennsylvania v. Ritchie, 480 U.S. 39 (1987). .*passim*
Riley v. Taylor, 277 F.3d 261 (3rd Cir. 2001) 16
Skilling v. United States, 175 L. Ed. 2d 267 (2009) 5
Strickler v. Greene, 527 U.S. 263 (1999) 13,14
U.S. v. Agurs, 427 U.S. 97 (1976) 14
U.S. v. Alvarez, 358 F.3d 1194 (9th Cir. 2004) .. 17
U.S. v. Bagley, 473 U.S. 667 (1985) 24

U.S. v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993) 23
U.S. v. Borelli, 336 F.2d 376 (2d Cir. 1964) 31, 34
U.S. v. Broce, 488 U.S. 563 (1989) 27
U.S. v. Burroughs, 830 F.2d 1574 (11th Cir. 1987) 30, 34
U.S. v. Falcone, 311 U.S. 205 (1940) 32
U.S. v. Jimenez Recio, 537 U.S. 270 (2003) 26
U.S. v. Kiszewski, 877 F.2d 210 (2d Cir. 1989) .. 17
U.S. v. Lanier, 520 U.S. 259 (1997) 5
U.S. v. Lechuga, 994 F.2d 346 (7th Cir. *en banc* 1993) 33
U.S. v. Lennick, 18 F.3d 814 (9th Cir. 1994) .. 6, 34
U.S. v. Mincoff, 574 F.3d 1186 (9th Cir. 2009) .. *ibid*
U.S. v. Mitchell, 178 F.3d 904 (7th Cir. 1999) ... 16
U.S. v. Nelson, 66 F.3d 1036 (9th Cir. 1995) .. 7, 34
U.S. v. Scroggins, 485 F.3d 824 (5th Cir. 2007) .. 17
U.S. v. Thomas, 284 F.3d 746 (7th Cir. 2002) . 6, 33
U.S. v. Townsend, 924 F.2d 1385 (7th Cir. 1991) 30, 31, 32, 33
U.S. v. Valenzuela-Bernal, 458 U.S. 858 (1982).15,16
U.S. v. White, 492 F.3d 380 (6th Cir. 2007) ... 16,18
U.S. v. Yossunthorn, 167 F.3d 1267 (9th Cir. 1999) 7, 27, 34
Weyhrauch v. U.S., 129 S. Ct. 2863 (2009) 5

FEDERAL STATUTES

21 U.S.C. § 841(a)(1) 1,7
21 U.S.C. § 843(b) 1,7
21 U.S.C. § 846 1,2,7
18 U.S.C. § 1001 20
28 U.S.C. § 1254(1) 1
18 U.S.C. § 1346 5
18 U.S.C.§ 3500 21

MISCELLANEOUS

The Wall Street Journal, "*The Ted Stevens Scandal.*" (April 2, 2009) 24

PETITION FOR A WRIT OF CERTIORARI

Petitioner, James Mincoff, respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 31, 2009.

OPINION BELOW

On July 31, 2009, the Ninth Circuit issued an opinion[1] affirming Mincoff's conviction and twenty year sentence in this direct appeal from convictions for conspiracy to distribute cocaine under 21 U.S.C. §841(a)(1) and §846, attempt to distribute cocaine under 21 U.S.C. §846, and two counts of unlawful use of a communication facility. 21 U.S.C. §843(b). Petitioner's Petition for Rehearing and Rehearing En Banc was denied on September 8, 2009.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS

United States Constitution, Amendment V: "No person shall...be deprived of life, liberty, or property without due process of law...."

21 U.S.C. §841(a)(1): "(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally– (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance...." 21 U.S.C.

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[1] The opinion, U.S. v. Mincoff, 574 F.3d 1186 (9th Cir. 2009), and order denying the petition for rehearing and rehearing en banc are attached as App. A and App. B.

§846: "Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

REASONS FOR GRANTING CERTIORARI

1. In seeking discovery of the many statements Munoz made to the agents during his pre-charge and post-charge cooperation, the Opinion states petitioner failed to show any potential exculpatory or impeachment information. App. A, p. 24. Petitioner was surely hampered in that effort because of the refusal of the government to turn over Munoz's debriefings with the federal agents. Further, on the stand, Munoz testified he did not provide the agents all the information they asked about in initial interviews. When asked if he "provide[d] these particular agents with all of the information which they asked you about?" he answered: "I don't think right there and then." RT 232-233; ER 165-166.

Given Munoz's propensity to give contradictory statements (always resolving them in the government's favor),[2] petitioner had the right to

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[2] During trial, when asked about the debriefings with the agents, his initial testimony was that agents read back his statements to him. After a lengthy break, he then denied they did so. AOB, pp. 47-48. This showed Munoz's awareness of how to tailor his testimony to please the government and avoid Jencks issues which would have warranted the turn over of all his debriefings. Such blatant inconsistency on the witness stand provided a further basis

trace the evolution of his contradictions from the day of his first debriefing to show his bias, motive, contradictions and thus to impeach him. Munoz was the government's central witness who had everything to lose if he did not testify in a manner expected of him by the government. It was Munoz's conclusory opinion which the Opinion relies upon to uphold the notion of a completed sale agreement and thus a conspiracy. App. A, at p. 12. His credibility was central to the case and petitioner was denied critical exculpatory materials -- evidence that in his debriefing interviews with the agents he was not candid.

Petitioner argued to the Court of Appeals that he had at least made a sufficient showing that an in camera review of the debriefings should have been made by the trial court. Despite vigorous discovery motions made by petitioner, virtually nothing relevant was turned over except one statement in which Munoz said the 2004 transaction involved 5, not 8, kilos.

The Circuits have not established standards for conducting in camera reviews of such Brady v. Maryland, 373 U.S. 83 (1963) material. It is generally said to be within the discretion of the trial court to hold such hearings. However, without parameters as to when such reviews should be held, the courts are inevitably in conflict about the

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for the turnover of the debriefings, or for in camera review of them.

required showing sufficient to warrant such review. Here, petitioner pointed to Munoz's admission he was not candid initially with the agents during the debriefings. Under any standard, given his cooperating status and knowledge that his trial testimony could save him almost two decades in prison (as it did), his performance on the witness stand (*see* fn. 7 supra), and its centrality to the government case, mandated such review to preserve the petitioner's due process rights to impeaching information.

2. Petitioner asked Munoz if he could secure cocaine to sell. He could not. Based on that evidence, the Circuit opinion upholds the conspiracy and attempted distribution convictions. That is, a *potential* buyer of contraband is deemed a criminal conspirator with a *potential* seller when the two have no agreement on the essentials of a purchase and no agreement between them for further distribution beyond the potential buy-sell. This is an enormously expansive application of conspiracy law which, under the most fundamental conventional standards, required an *agreement* of the terms of the illegal act. It grossly expands criminal liability to situations where one person merely asks for contraband from another without the slightest notion that the other can deliver (and in fact, is repeatedly told he is unable to provide the product sought).

This Court now has before it three cases

involving the expansion of criminal liability involving mail fraud. 18 U.S.C. § 1346. Skilling v. U.S., cert. granted October 13, 2009,175 L. Ed. 2d 267; Weyhrauch v. U.S., 129 S.Ct. 2863, cert. granted on June 29, 2009; Black v. U.S., 129 S. Ct. 2379, cert. granted on May 18, 2009.

As with the issue in those cases, no one should be subject to criminal prosecution without "fair warning." Fair warning requires that criminal laws specify the scope of their embrace in advance and with clarity. U.S. v. Lanier, 520 U.S. 259, 266 (1997). The requirement of advanced specification is based on the fundamental ideal that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.). The fair warning "touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." Lanier, *supra,* 520 U.S. at 267.

This case exemplifies the lack of limits on the expanse of the conspiracy net in two regards. First, Wharton's Rule states that an agreement by two persons to commit a particular crime presumptively cannot be prosecuted as a conspiracy when the crime necessarily requires the participation of two persons for its commission. *See* Iannelli v. United

States, 420 U.S. 770 (1975); Gebardi v. United States, 287 U.S. 112, 121 (1932). This is the premise by which a "buy-sell" *agreement* is not deemed a conspiracy. Second, where the facts do not even amount to an agreement (at best, repeated requests by petitioner to buy an undetermined commodity that Munoz never had and never could possess), ruling that is a conspiratorial *agreement* untethers the concept of conspiracy to include mere requests for contraband. "[T]he essence of [a conspiracy]... is an agreement to commit an unlawful act." Iannelli v. United States, 420 U.S. 770, 777 (1975). Cases, such as this one, have obscured "the basic fact that the agreement is the essential evil at which the crime of conspiracy is directed." Id., at 778, fn. 10.

The Opinion stands in conflict with other Circuits (*e.g.*, U.S. v. Thomas, 284 F.3d 746, 753 (7th Cir. 2002) ("Thomas profited from his sales to Mrs. Jones. But Thomas made his money at the point of sale; his profit did not depend on the Joneses' subsequent success in distributing the cocaine to their customers"). It also conflicts with the Ninth Circuit itself. "[P]roof that a defendant sold drugs to other individuals does not prove the existence of a conspiracy." U.S. v. Lennick, 18 F.3d 814, 819 (9th Cir. 1994).

These arguments apply equally to the attempt count. "An attempt conviction requires evidence that the defendant intended to violate the

statute, and that he took a substantial step toward completing the violation." U.S. v. Nelson, 66 F.3d 1036, 1042 (9th Cir. 1995). To constitute an attempt, the conduct must unequivocally demonstrate the crime will take place unless interrupted by independent circumstances. U.S. v. Yossunthorn, 167 F.3d 1267, 1271 (9th Cir. 1999). Given the lack of any possibility of a sale, petitioner could hardly have acted to attempt to distribute. Munoz's failure to have any cocaine was not an interrupting independent circumstance. Without his possession, there could be no sale (assuming the parties then came to terms) and Munoz could not set the terms of a sale to Mincoff without himself knowing what the terms of a sale would be from his own supplier.

STATEMENT OF THE CASE

A. District Court Proceedings

On June 6, 2006, petitioner Mincoff was indicted for conspiracy to distribute cocaine in case number 06cr1241. CR 1: ER 73-74.[3] A year later, on June 26, 2007, the government superseded the indictment and charged only Mincoff with conspiracy to distribute cocaine under 21 U.S.C. §841(a)(1) and §846, attempt to distribute cocaine under 21 U.S.C. §846, and two counts of unlawful

[3] "CR" refers to the Clerk's Record document number followed by the docket number. "RT" refers to the reporter's transcript. ER refers to the excerpts of record filed with the Circuit.

use of a communication facility under 21 U.S.C. §843(b). CR 108: ER 75-77. After numerous pre-trial motion proceedings, trial began August 20, 2007, and continued until August 22, 2007. Jurors began deliberations on the morning of August 23 and returned guilty verdicts by mid-day on the four counts. CR 147.

On February 1, 2008, Mincoff was sentenced to a minimum mandatory 20 years in prison on counts 1 and 2, to be served concurrently. This was the result of a doubling enhancement due to a prior conviction. On counts 3 and 4, he received concurrent 96 month sentences (also doubled because of the prior conviction). No fine was imposed. CR 211; ER1-1-4.

B. Statement of the Facts

1. Prosecution Case. FBI Agent Allan Vitkosky testified that in the latter months of 2004 and early 2005, while investigating the Mexican Mafia, he received information about Jessie Munoz. RT 58. (Mincoff had nothing to do with the Mexican Mafia.) This led to court authorized wiretaps of Munoz's cell phone during June and July, 2005. RT 59, 60. As the June and July 2005 wiretap recordings were being made, phone calls between Munoz and petitioner Mincoff were intercepted. They discussed a possible cocaine sale. Vitkosky testified petitioner had two phone numbers, one in his name and the other in the name of Jim Milner. RT 395, 396.

By December, 2005, Jessie Munoz became an informant and cooperating government witness. RT 230. In the dozen or so meetings he had with the government agents, Munoz testified he did not initially reveal all of his information to the agents in answering their questions. RT 232-233, 240; ER 165-166, 169.

Munoz testified he had been involved in a wide range of criminal activities. One such activity was conspiring with Mincoff, Juvenal "Kenny" Vega-Soto, and others to distribute cocaine. RT 167, 168. In separate and unrelated cases (06cr1241, 06cr1242, 06cr1243 and 06cr1244), he pleaded guilty to participation in a racketeering conspiracy with the Mexican Mafia, drug offenses involving cocaine and methamphetamine, and a conspiracy to murder Alvaro Hernandez. RT 169, 170, 255; ER 151, 152, 170. His plea bargains in these cases required him to cooperate with the government. If satisfied with his cooperation, the government stated it would make the sentencing court aware of it. RT 171; ER 153. Without a government sentence reduction recommendation based on his cooperation, the government would recommend a 26 year prison sentence (312 months). RT 266; ER 172. (He ultimately was sentenced to 87 months.)

Munoz testified he first met Mincoff in Rosarito Beach, Baja California. RT 112. Thereafter, Munoz would occasionally rent limousines from Tropical, Mincoff's limousine company. RT 114. In

April or May, 2004, Mincoff called Munoz and asked him if he had access to cocaine. RT 116. Munoz, being a drug dealer with many customers (RT 117), said yes. Munoz told the agents Mincoff placed an order for eight kilograms of cocaine and Munoz said he would try to obtain it. RT 119. However, later he changed his story and told the agents the order was for five kilos. RT 238; ER 167.

Munoz then contacted his connection, Kenny Vega. RT 120, 121. Munoz acquired five kilos of cocaine from Vega which were delivered by an associate, "the Engineer," to his home in Escondido, California. RT 123, 124. Munoz then called Mincoff who came to Munoz's home where Mincoff was provided the cocaine. RT 128, 129. Mincoff took it to his buyer and came back to Munoz's home with the purchase money. The price per kilo was $15,500 and Munoz's share was $500 per kilo. RT 131. Munoz gave the balance of the money to the "Engineer" as payment for the cocaine. RT 133. That was the end of Mincoff's contacts with Munoz for drugs. Munoz "thought it would be a one-time thing." RT 134, 259, 353; ER 150, 171, 183.

However, well over a year later, in July, 2005, Mincoff called Munoz about cocaine. RT 175, 177. Mincoff said he would like to put "six of those together," which meant six kilos of cocaine. He said he had a purchaser to buy them. RT 178. Mincoff mentioned a previous transaction had been short about three grams. RT 181. He also said the price

then, he thought, was $15,500 per kilo. Munoz characterized Mincoff's comment about price as his way of seeing "if the price is right." RT 181, 182. Munoz replied, "Nah."[4] Munoz stated he would find out about the price. ER 80.

Munoz then called his supplier, Kenny Vega, about obtaining 6 or 7 kilos by the following Wednesday or Thursday. RT 187, 249. Two days later, Mincoff called to see if Munoz had heard from his connection. RT 188. He wanted to hurry the transaction as his "guy" (buyer) was there. RT 189. Munoz testified that the contingency, or missing piece to a deal happening, was his inability to secure any cocaine. RT 190. If he had obtained it, he thought they would do the deal. RT 191. But Munoz's usual supplier, Vega, never had any cocaine during this time. RT 323.

Munoz characterized Mincoff's calls to him as "shopping." RT 314; ER 180. They had no agreement on a quantity, quality, the price (RT 313), or the timing[5] of a purchase. Further, Munoz knew Mincoff would not pay for any cocaine until it had been tested by his buyer for quality. RT 320; ER 180a. Munoz likened the discussions with Mincoff to that of a car sale. A buyer would test

[4] Agent Vitkosky took this to mean that Munoz "apparently he believed it was some other price." RT 104; ER 149.

[5] Mincoff told Munoz, "if you can't find out right away, this ain't gonna happen, just let me know so I can follow it up with this other guy." RT 313; ER 179.

drive it before agreeing to buy. RT 343; ER 181a. He knew Mincoff would not pay for cocaine "until the quality and the price of the cocaine was found to be acceptable." RT 320; ER 180a. There was no agreement to buy anything until those two issues were settled. RT 321; ER 181. It also made no difference to Munoz how many customers Mincoff had. RT 349. Nevertheless, he stated on redirect examination that he believed there was an agreement with Mincoff, as in the words of the indictment, "to obtain cocaine and redistribute that to other individuals." RT 344; ER 182.

As evidence of the fluctuating nature of the discussions, Mincoff called Munoz and reduced the quantity he wanted to buy to three kilos. RT 193; ER 154. Because Kenny Vega was not getting him cocaine, Munoz tried one of Vega's associates, Shadow. Ibid. On a recorded call to Shadow, Munoz stated, "they can do 3 kilos of cocaine right now." RT 194. To Munoz, the price was going to be $15,500 per kilo. RT 194-195; ER 155-156. But Shadow could not supply it.

On July 28th, after unsuccessfully trying to reach the Engineer, Munoz spoke again with Mincoff. The latter said, "my guy is sitting here...he is sitting here with me...he's got the paperwork [money] for three, he is ready to roll." RT 200, 201; ER 157, 158. Mincoff wanted Munoz to deliver the cocaine to his home to speed the transaction. That way Mincoff would not have to

pick it up, take it to his buyer, get money, and return to Munoz's home. RT 202, 203; ER 159,160.

In another call, Mincoff reduced the amount desired "from 3 kilos to 1 because the other people [buyers] don't want to wait." RT 203. On August 2, 3, and 4, there were more phone discussions but nothing came of them as Munoz never could obtain cocaine. RT 208, 209; ER 161, 162. On August 5th, Mincoff called to say he found some cocaine somewhere else and "they" [his buyers] didn't like it, so if Munoz could obtain some he was still interested. RT 221; ER 164. But again, nothing happened.

ARGUMENT

I. BECAUSE THE COURTS OF APPEAL ARE CONFLICTING ON THE STANDARDS FOR IN CAMERA REVIEW OF PROSECUTION WITNESS PRE-TRIAL STATEMENTS UNDER BRADY V. MARYLAND,[6] REVIEW BY THIS COURT IS WARRANTED TO SET FORTH STANDARDS TO ASSURE COMPLIANCE WITH DUE PROCESS.

A. Components of a Brady v. Maryland Showing.

In Strickler v. Greene, 527 U.S. 263, 281-2 (1999), this Court summarized the rules for Brady violations: "There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is

[6] Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* Giglio v. United States, 405 U.S. 150, 154 (1972).

exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." The government has an obligation to produce this material with or without a request. U.S. v. Agurs, 427 U.S. 97, 107 (1976). Where, as here, there were multiple specific pre-trial requests for impeaching material; "the failure to make any response [by the government] is seldom, if ever, excusable" Id., at 106.

The Brady issue exists "irrespective of the good faith or bad faith of the prosecution." In other words, it is the character of the evidence not the character of the prosecutor that is at issue. Brady, *supra*, 373 U.S. 87; Strickler v. Greene, *supra*, 527 U.S. 280.

As to prejudice, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995).

B. Upon the Prosecution Refusal to Turn Over Debriefings, In Camera Review is Mandated to Assure Brady Compliance.

In Pennsylvania v. Ritchie, 480 U.S. 39 (1987), this Court considered a Brady motion by a defendant charged with various sexual offenses such

as rape, involuntary sexual intercourse, incest and corruption of a minor (his daughter). The Court held he was entitled to have the file of a state child protective services agency reviewed in camera by the trial court in order to determine whether the file(s) contained Brady information, *i.e.,* material that probably would have changed the outcome of the trial. Id., at 58. The trial court was instructed to grant a new trial if the files possessed by the child protective agency contained information that could have changed the outcome of his trial. Ibid. Alternatively, if the in camera review showed that the files contained no such information, or if the nondisclosure by the agency was harmless beyond a reasonable doubt, the trial court could reinstate the defendant's conviction. Ibid.

Ritchie was premised on the balancing policy underlying the defendant's due process right and the privileged nature of the state agency files involving the minor. In camera review would serve the defendant's interest without destroying the state's need to protect the confidentiality of those involved in child-abuse investigations. Ibid. at 61.

But what is the required showing for the right to an in camera review? Ritchie suggests that the defendant must make "some plausible showing" that the matter sought is material and favorable, quoting from U.S. v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) ("He must at least make some plausible showing of how their testimony would

have been both material and favorable to his defense"). Id. at 58, n 15. Upon such a plausible showing, a defendant has the right to have the trial court inspect the material in a manner that provides a "properly reviewable judicial determination." Love v. Johnson, 57 F.3d 1305, 1313 (4th Cir. 1995) (remanding habeas petitioner's case for in camera inspection).

The problem, as demonstrated by petitioner's case, is that reviewing courts have no agreed upon standards in determining when there is (or is not) a "plausible justification" for in camera review. Some Courts of Appeals have used a generic abuse of discretion standard and uphold or reverse denials of in camera review decisions for Brady information. *Compare, e.g,* U.S. v. White, 492 F.3d 380, 413 (6th Cir. 2007) ("we find the district court abused its discretion in failing to hold an evidentiary hearing [including in camera review] to more carefully consider the nature of the documents and information contained therein."); U.S. v. Mitchell, 178 F.3d 904, 909 (7th Cir. 1999) ("the district judge did not abuse his discretion when he refused to review presentence reports.")[7]

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[7] *Compare* Riley v. Taylor, 277 F.3d 261 (3rd Cir. 2001), in the face of a Brady claim concerning wiretap conversations, the government provided the appellate court and the petitioner with wiretap logs showing no intercepts involving the witness in question and fatally undermining the Brady claim or a need for in camera review.

Other Courts of Appeals have simply remanded cases to the district court for such reviews without mentioning standards such as "plausible showing" or "abuse of discretion" for granting relief. *E.g.,* U.S. v. Alvarez, 358 F.3d 1194, 1209 (9th Cir. 2004) ("we hold that where a district court fails to conduct an *in camera* review of the probation files of significant witnesses pursuant to a timely defense request for *Brady* materials, we will vacate the defendant's conviction and remand the case to the district court with instructions to conduct the review"; U.S. v. Kiszewski, 877 F.2d 210, 216 (2d Cir. 1989) ("it is necessary to remand this case to allow the district court to conduct an in camera examination of the file to determine whether information in the file should have been disclosed and, if so, whether appellant is entitled to a new trial, or whether "nondisclosure was harmless beyond a reasonable doubt"); Anderson v. United States, 788 F.2d 517, 519 (8th Cir. 1986) ("we remand with directions that the district court review *in camera* the Clinton tapes and the statements made by Clinton during the polygraph examination"); U.S. v. Scroggins, 485 F.3d 824, 836 (5th Cir. 2007) ("we instructed the district court to conduct an in camera inspection and make appropriate findings as to whether the PSRs contained any material Brady or Giglio information").

The showing necessary to obtain in camera

review is unsettled although it is said to be "appropriate upon a lesser showing" than a straightforward Brady violation. U.S. v. White, *supra*, at 410. In Ritchie, this Court stated that once a defendant establishes a basis for his claim that the records sought contain material evidence, even though he cannot articulate with specificity the materiality of those records, remand for in camera review may be appropriate upon a showing the request is plausible. Ritchie, *supra* at 480 U.S. 58 n.15.

Here, despite specific requests, the appellate court simply denied the in camera issue and the broader Brady challenge petitioner made, that is, that the government should have turned over the Munoz debriefings. In doing so, it made the startling statement that "Mincoff has not identified any potentially exculpatory evidence that was not disclosed to him." App. A, p. 24. Of course he did not identify the matters never disclosed to him. How could he? The record reflects repeated motions for impeaching material. The mere fact that Munoz was the subject of a dozen debriefings is indicative of his lack of candor initially -- why else the necessity for repeated meetings? He was a witness "singing for his supper."[8] But if there were

[8] As Judge Trott of the Ninth Circuit has stated it: "because of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that

any need for a further showing, Munoz's own admission at trial of an initial lack of candor with the agents in his dozen debriefings cinched it.

C. Petitioner Made A Plausible Showing For In Camera Inspection

Jessie Munoz was the major government witness. As part of his bargain with the government, he pleaded guilty to four separate serious criminal cases involving large scale narcotics dealings and a RICO conspiracy which included his participation in a planned murder. Despite the gravity of the charges, early on he was allowed to be placed on bail. He had a great motive to satisfy the government in his testimony. Without a government sentencing reduction motion for his cooperation, the government would recommend approximately a 26-year prison sentence. RT 266.

Munoz testified he took part in a dozen or so

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the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cell-mates alike." N. Mariana Islands v. Bowie, 243 F.3d 1109, 1124 (9th Cir. 2001) (noting "[w]hen one reads the trial transcript of this case and examines the full record, including the witnesses' initial statements to the police, one finds *many inconsistencies and convenient failures of recollection* on the part of the government's accomplice witnesses, who no doubt were the keys to its case." Id., 1120; italics supplied.

meetings with government agents. When asked if during the interviews with the agents he answered questions about his involvement in the conspiracy to murder Alvaro Hernandez, he replied, "I might have." RT 232; ER 165. "I think I did." When asked if he "provide[d] these particular agents with all of the information which they asked you about?" he answered: "I don't think right there and then." RT 232-233; ER 165-166.[9]

When asked if he gave the agents a written statement, he initially said, "I think so," but then retreated to, "No, I don't really recall if I did or not. I don't think I did. I know I didn't. I don't even know if I did. I don't remember." RT 233; ER 166.

Munoz demonstrated his ability to change his statements during trial to please the government. Despite the grave charges against him in the four separate indictments in which he was named, he was permitted to be free on bond shortly after his arraignment.

Munoz testified that during his second debriefing, the agents would sometimes read their "notes back to you [Munoz] during the course of this meeting to determine whether or not they had accurately recorded what you had told them." RT 239, *see also* RT 240. ER 168, 169. This revelation brought a defense request for Jencks material under

[9] False statements to federal officers are each chargeable as violations of 18 U.S.C. § 1001.

18 U.S.C. § 3500. RT 270; ER 173. The government admitted "there were notes taken [during Munoz interviews], there were reports generated. They have not been produced because, I think *contrary to Mr. Munoz's testimony* that it differed from interview to interview...nor were the notes read back to him in any fashion such that he adopted the contents." RT 270-271; ER 173-174; italics added.

After a lunch break, a hearing was held on the Jencks issue. This time Munoz testified that any read backs were only, "I think just like spelling, and the names, but he never read it back to me." RT 283, *see also* 288, 289; ER 175, 176, 177. Based on this version of Munoz's testimony, the court concluded "the government has complied with its Jencks obligations." RT 291; ERI 62. Thus, in the course of a few pages of trial testimony, Munoz went from stating the agents read back their notes to him for accuracy to stating they were never read back to him. The man knew which side of his bread was buttered.

Despite a dozen or so interviews with agents and prosecutors, the Munoz interview notes and reports were not turned over to petitioner. The only contradictory statement petitioner learned about before trial was when Munoz reduced the amount of the 2004 cocaine he allegedly transferred to appellant from eight to five kilos. RT 238; ER 167.

Petitioner made multiple motions for

impeachment evidence starting with his discovery motion in August 2006. There, he specifically asked for "untruthful, false, misleading, incomplete, or inaccurate information or testimony." CR 33-p.12; ER 188. In another pleading filed a month before trial, he again asked for Brady-Giglio material. CR 116. Based on government representations that "the government has produced the plea agreements, the addendums, and the RAP sheet," the court denied the discovery motion. RTAug. 3, 2007, p. 50-51; ER 67-68. Thus, no debriefing notes were turned over from the many agent interviews with Munoz. All of them should have been ordered to be turned over, or alternatively, the district court should have reviewed them in camera to determine the existence of Brady-Giglio matter.

It is highly likely that a criminal like Munoz, as an associate of the Mexican Mafia, dissembled from the beginning in his discussions with the agents. At trial, he even admitted he was not forthcoming initially (translation: he lied to the federal agents). Yet, Giglio information was not produced. By "definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." U.S. v. Bernal-

Obeso, 989 F.2d 331, 333 (9th Cir. 1993).

Munoz had the most compelling reasons to seek favor with the government by implicating Mincoff – to avoid spending the bulk of his life in prison. He had a great motive to lie about the alleged 2004 sale of cocaine to Mincoff. Further, he had similar reasons to lie about the 2005 phone discussions. When the phone discussions showed no agreement on the necessities of a buy-sell arrangement, he conveniently added his belief that it was a "done deal" if he could have just obtained cocaine. Whether he was making similar statements in his dozen interviews with the agents is an additional reason warranting the remand. His own testimony reflecting his lack of candor with them mandates this result.

Long ago, this Court observed that "the use of informers, accessories, accomplices, false friends, or any of the other betrayals which are `dirty business' may raise questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross examination and to have the issues submitted to the jury with careful instructions." On Lee v. United States, 343 U.S. 747, 757 (1952). Here, Munoz's credibility was improperly shielded from review by the refusal of the trial court to inspect for and provide petitioner his inconsistent statements to the agents in his multiple debriefings.

D. Review Should Be Granted to Resolve the Question Presented.

This issue is recurrent in numerous criminal cases. The dismissal of the case against former Senator Ted Stevens is one of the more recent publicized examples of government withholding Brady impeachment evidence of a government star witness.[10] If there is not even judicial review of the record of the witness's statements, Brady violations are undiscovered based on the contrary representation of the government. Further, the impact of such an error is compounded because an "incomplete response to a specific [Brady] request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." U.S. v. Bagley, 473 U.S. 667, 682 (1985).

As has been too often demonstrated, prosecutors may have the most crabbed interpretation of what constitutes impeachment of

[10] In moving for dismissal in that case, the Department of "Justice said it 'recently discovered' that prosecutors withheld from the defense notes about an interview last April with the state's star witness, Bill Allen, that contradicted his subsequent testimony." The Wall Street Journal, April 2, 2009, "The Ted Stevens Scandal." *See* http://online.wsj.com/article/SB123863051723580701.html.

their major witnesses. Without the limited review that an in camera procedure entails, constitutional due process violations are undiscovered and fair trial rights are sacrificed.

The question is what showing is required for the trial court to conduct an in camera inspection. Whatever that standard would be, here, admissions by the cooperator of lack of candor should have been sufficient to warrant the review.[11] This Court should grant the petition and resolve the confusion over the standard, if not the inter-Circuit conflict, on when in camera reviews should be conducted to resolve Brady disputes.

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[11] "A rule ... declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Banks v. Dretke, 540 U.S. 668, 696 (2004).

II. CONSPIRACY AND ATTEMPTED DISTRIBUTION CONVICTIONS CANNOT BE PREDICATED ON MERE REPEATED REQUESTS TO BUY CONTRABAND.

A. A Request to Purchase Is Not A Federal Conspiratorial Agreement. If a person calls another to buy a car and asks for a 1999 Chevrolet Camaro, and the would-be seller says he will look for one, if that is as far as the process goes, no one would argue that an agreement was reached on a car sale. Yet, by enlarging the notion of a criminal agreement constituting a conspiracy, that is what the Circuit has held in petitioner's case.

> The Court has repeatedly said that the essence of a conspiracy is "an agreement to commit an unlawful act." Iannelli v. United States, 420 U.S. 770, 777, 43 L. Ed. 2d 616, 95 S. Ct. 1284 (1975); see United States v. Shabani, 513 U.S. 10, 16, 130 L. Ed. 2d 225, 115 S. Ct. 382 (1994); Braverman v. United States, 317 U.S. 49, 53, 87 L. Ed. 23, 63 S. Ct. 99 (1942).That agreement is "a distinct evil," which "may exist and be punished whether or not the substantive crime ensues." Salinas v. United States, 522 U.S. 52, 65, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997).

U.S. v. Jimenez Recio, 537 U.S. 270, 274-275 (2003).

> In a conspiracy charge, the term

> "agreement" is all but synonymous with the conspiracy itself, and as such has great operative force. We held in Braverman v. United States, 317 U.S. 49, 53 (1942), that "[t]he gist of the crime of conspiracy as defined by the statute is the agreement . . . to commit one or more unlawful acts," from which it follows that "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects."

U.S. v. Broce, 488 U.S. 563, 570 (1989).

Here, the only agreement shown by the undisputed facts was that Munoz was trying to find cocaine. He failed. The parties thus never had the opportunity to agree on such necessary predicates to an agreement for sale (much less for distribution as was charged) such as price, quality, and quantity. Thus, there was no conspiracy to distribute cocaine, as was charged. The government failed to prove a conspiracy to possess for lack of any agreement. *A fortiorari*, there was no conspiracy to distribute to others. The "essential elements of the transaction yet to be arranged." U.S. v. Yossunthorn, *supra* at 1272 (9th Cir. 1999). "The fewer elements of a drug transaction [that] are agreed upon, the more remains to be done for the possession to be realized." Id., at n. 5. In petitioner's case, all of the essential elements were up in the air. There was no

conspiracy shown to distribute.

Long ago, this Court "warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." Grunewald v. United States, 353 U.S. 391, 404 (1957). This is an example of enlargening the net beyond legitimate reach.

Another example of enlargening the net is the Opinion's use of so-called "fronting." The Opinion speaks to the issue of "fronting" as a factor in showing a distribution conspiracy. *See* App. A, 8, 9, 11. "Fronting" is said to show a relationship of trust between buyer and seller to advance the alleged distribution conspiracy. But there was no "fronting" in 2005. The government never even argued the point to the jury. The concept first arose in government post-trial briefing. The 2004 transaction was the only alleged sale. Munoz said he had the cocaine delivered to Mincoff who took it to his buyer and returned with the money to give to Munoz's delivery man. This is not "fronting" in the sense of consignment sales or a sale on credit, particularly since this was a first-time deal. The only discussion about delivery in 2005 was for a direct, simultaneous exchange of money and cocaine at Mincoff's home. Mincoff asked Munoz to deliver the cocaine *directly to him* so he would not have to pick it up and take it to his buyers for their approvals. RT 202; SER 286. Whatever the

relevance of "fronting" to conspiracies, it did not occur here. If direct delivery to the buyer's home is fronting, then every exchange is fronting and the term has no meaning except as a factor to eliminate the "buy-sell" doctrine and further expand the conspiracy net.

B. Even A Buy-Sell Agreement Where All Essential Terms Are Settled by Two Parties is Not a Federal Conspiracy. The accepted doctrine of "buy-sell" dictates that there is no conspiratorial agreement even if based on a perfected agreement for the buy and sale. If this were not true, every buy-sell would be chargeable as a federal conspiracy. This "buy-sell" scenario is insufficient evidence as a matter of law to justify a conspiracy conviction.[12] Again, the Opinion expands criminal conspiracy liability to situations where one person

[12] The buy-sell doctrine is related to Wharton's Rule which states that an agreement by two persons to commit a particular crime presumptively cannot be prosecuted as a conspiracy when the crime necessarily requires the participation of two persons for its commission. *See* Iannelli v. United States, 420 U.S. 770, 773 fn. 5 (1975), quoting the rule: "'An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.' 1 R. Anderson, Wharton's Criminal Law and Procedure § 89, p. 191 (1957)." *See also* Gebardi v. United States, 287 U.S. 112, 122-123 (1932) (no conspiracy liability for transporting a consenting female across state lines for immoral purposes in violation of the Mann Act where the female was guilty of no substantive offense.)

merely seeks contraband from another.

> Where the buyer's purpose is merely to buy, the seller's purpose is merely to sell and no prior or contemporaneous understanding exists between the two beyond the sales agreement, no conspiracy has been shown. No joint objective exits among the two, even though both are aware of the illegal nature of the goods.

U.S. v. Burroughs, 830 F.2d 1574, 1581 (11th Cir. 1987) .

In U.S. v. Townsend, 924 F.2d 1385, 1387 (7th Cir. 1991), defendant Townsend was found not to be part of a larger conspiracy even though he knew he was dealing with "a member of a narcotics distribution chain, but there was no evidence he was working to further their interests as well as his own." Id., at 1404. The same may be said here as neither Munoz nor petitioner agreed to work to further anyone else's interests.

In Townsend, the court discussed at length the difficulties of applying the sprawling and pervasive offense of conspiracy, a crime with a tendency to expand to the limits of logic. Id. at 1387. In considering a large scale multi-drug conspiracy involving nineteen charged defendants, the court observed the limits of the government joining every person with contact with other dealers into one conspiracy: "The suppliers in a 'chain' are

not necessarily interested in the success of a particular retailer, or group of retailers, down the line. If the chain is characterized by sporadic dealings between independent dealers, what do suppliers care if the middlemen are able to unload the stuff further? As Judge Friendly noted in [U.S. v.] Borelli [336 F.2d 376 (2d Cir. 1964)]:

> however reasonable the so-called presumption of continuity may be as to all the participants of a conspiracy which intends a single act, such as the robbing of a bank, or even as to the core of a conspiracy to import or resell narcotics, its force is diminished as to the outer links -- buyers indifferent to their sources of supply and turning from one source to another, and suppliers equally indifferent to the identity of their customers. Borelli, 336 F.2d at 384."

U.S. v. Townsend, *supra,* at 1391.

More specifically, with regard to drug conspiracies, the court gave the following example of when a buy-sell does not extend into a wider conspiracy:

> By the same token, when dealer A sells drugs to dealer B, we don't presume that A has agreed to work for the benefit of everyone else with whom B deals, or that A benefits from B's other deals. If A knows of, and benefits from, B's subsequent distribution, we may

> infer a limited agreement to distribute between A and B. *See, e.g.,* United States v. Roth, 777 F.2d 1200, 1205 (7th Cir. 1985) ("while the ultimate consumer is not himself a conspirator . . . the middleman is"). But agreement to join other endeavors and distributors "cannot be drawn merely from knowledge the buyer will use the goods illegally." Direct Sales Co. v. United States, 319 U.S. 703, 709, 87 L. Ed. 1674, 63 S. Ct. 1265 (1943) (interpreting United States v. Falcone, 311 U.S. 205, 85 L. Ed. 128, 61 S. Ct. 204 (1940)).[13]

Id., at 1392. Townsend focused on the situation akin to petitioner's case:

> A seller of narcotics in bulk surely knows that the purchasers will undertake to resell the goods over an uncertain period of time, and the circumstances may also warrant the inference that a supplier or a purchaser indicated a willingness to repeat. But a sale or a purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties *for whatever*

[13] U.S. v. Falcone, 311 U.S. 205 (1940) states "that one does not become a party to a conspiracy by aiding and abetting it, through sales and supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally." Direct Sales Company v. United States, 319 U.S. 703, 709 (1943).

period they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction. Quoting from Borelli, *supra*, 336 F.2d 376, at 384; emphasis in original.

"The mere purchase or sale of drugs (even in large quantities) does not demonstrate an agreement to join a drug distribution conspiracy 'any more than a purchase of 100 tons of steel to build a skyscraper shows that the buyer has "joined" the corporate enterprise of the manufacturer.' [Citations]." Id., at 1394.

This is the reason why a "buy-sell" agreement is not deemed a conspiracy-- because it would make all drug sales into conspiracies. But here, the facts did not even amount to any agreement for a sale since there was, at best, repeated requests by petitioner to buy a commodity that Munoz never had and never could possess to sell.

The Opinion stands in conflict with other Circuits on the buy-sell issue. *E.g.*, U.S. v. Thomas, 284 F.3d 746, 753 (7th Cir. 2002) ("Thomas profited from his sales to Mrs. Jones. But Thomas made his money at the point of sale; his profit did not depend on the Joneses' subsequent success in distributing the cocaine to their customers"); U.S. v. Lechuga, 994 F.2d 346, 347 (7th Cir. *en banc* 1993) ("[T]he mere fact that [the defendant] sold [an alleged

conspirator] a quantity of cocaine too large for the [alleged conspirator's] personal use, and therefore must have known [the alleged conspirator] was planning to resell it, is insufficient to prove a conspiracy... [The sale of] large quantities of controlled substances, without more, cannot sustain a conspiracy conviction"); U.S. v. Burroughs, 830 F.2d 1574, 1581 (11th Cir. 1987); U.S. v. Borelli, 336 F.2d 376, 383 (2d Cir. 1964).

It also conflicts with the Ninth Circuit itself. "[P]roof that a defendant sold drugs to other individuals does not prove the existence of a conspiracy." U.S. v. Lennick, 18 F.3d 814, 819 (9th Cir. 1994).

The argument also applies to the attempt count. "An attempt conviction requires evidence that the defendant intended to violate the statute, and that he took a substantial step toward completing the violation." U.S. v. Nelson, 66 F.3d 1036, 1042 (9th Cir. 1995). To constitute an attempt, the conduct must unequivocally demonstrate the crime *will take place* unless interrupted by independent circumstances. U.S. v. Yossunthorn, 167 F.3d 1267, 1271 (9th Cir. 1999). Given the lack of any possibility of a sale, petitioner could hardly have acted to attempt to distribute. Munoz's failure to have any cocaine was not an interrupting independent circumstance. Without his possession, there could be no sale (assuming the

parties came to terms) and Munoz could not set the terms of a sale to Mincoff without himself knowing what the terms of a sale would be from his own supplier.

If in 1949, as Justice Jackson observed, the "loose practice as to this offense constitutes a serious threat to fairness in our administration of justice," it is all the more true today. Krulewitch v. United States, 336 U.S. 440, 446 (1949)(concurring.) With this case as an example, conspiracy and attempted distribution convictions are permitted merely on unsuccessful requests to purchase controlled substances.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari. In the alternative, the Court should grant the petition, vacate the judgment and remand for reconsideration in light of Pennsylvania v. Ritchie, *supra*.

12/1/09 Respectfully submitted,

Charles M. Sevilla
Attorney for Petitioner Mincoff

Appendix A 1

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES MINCOFF, aka Jim,
Defendant-Appellant.

No. 08-50058
D.C. No.
CR-06-01241-DMS-3
OPINION

Appeal from the United States District Court
for the Southern District of California
Dana M. Sabraw, District Judge, Presiding

Argued and Submitted
April 14, 2009 - Pasadena, California

Filed July 31, 2009

Before: William C. Canby, Jr., Johnnie B. Rawlinson and N. Randy Smith, Circuit Judges

Opinion by Judge Rawlinson

COUNSEL

Charles M. Sevilla, San Diego, California, for defendant-appellant James Mincoff.

Karen P. Hewitt, United States Attorney, Bruce R. Castetter, Assistant United States Attorney, and David D. Leshner (argued), Assistant United States Attorney, San Diego, California, for plaintiff-appellee United States.

OPINION

RAWLINSON, Circuit Judge:

Appellant James Mincoff (Mincoff) challenges his conviction and sentence for conspiracy to distribute cocaine, attempt to distribute cocaine, and unlawful use of a communication facility in violation of 21 U.S.C. §§ 841(a)(1), 846, and 843(b).

I. BACKGROUND

Mincoff and Jessie Munoz (Munoz)[1] met through a mutual friend during the late 1990s. Mincoff called Munoz in April or May, 2004, to ask whether Munoz had access to cocaine. Mincoff ordered eight kilograms of cocaine from Munoz. Because Munoz had never dealt cocaine before, he called Kenny Vega (Vega), his "meth connection," to help him obtain the cocaine. Vega was only able to supply Munoz with five kilograms of cocaine rather than the requested eight. Two or three days after Mincoff placed the order, Vega's driver "the Engineer"

[1] Munoz was originally one of four named defendants, but he entered a guilty plea and agreed to cooperate with the government. He was the main government witness at trial.

delivered the cocaine to Munoz's home.

Munoz called Mincoff to inform him that the cocaine had arrived, and Mincoff arrived within the hour to retrieve the drugs. Mincoff and Munoz agreed that Mincoff would take the cocaine to his customer and return with payment, which he did. Once Munoz received the purchase money from Mincoff, he paid Vega's driver. Future transactions between Mincoff and Munoz remained a possibility, provided that Mincoff's buyers returned.

In the course of a different investigation, the government received court authorization to wiretap two of Munoz's cellular telephones. Multiple calls between Munoz and Mincoff were intercepted as a result of these wiretaps.

July 24, 2005 Telephone Call

Mincoff contacted Munoz about a cocaine sale at 2:18 p.m. Mincoff explained, "[m]y one buddy called me, he's gonna be in town this week . . . [a]nd he is wondering if we can, uh, put like six of those together." FBI Special Agent Allan Vitkosky testified that this statement "means to attempt to obtain 6 kilograms of cocaine." Munoz also testified that he understood that Mincoff wanted to purchase six kilograms of cocaine on behalf of his buyer. Mincoff guaranteed Munoz that six of the kilograms would be sold, and maybe a seventh as well.

July 25, 2005 Telephone Calls

Munoz called Vega at 1:45 p.m. and asked whether he had been in touch with the Engineer because "[t]hey asked me for six of those things for this week." Munoz and Vega spoke again two minutes later, and Munoz affirmed that "they need

6 of them, maybe 7 but 6 for sure."

July 27, 2005 Telephone Calls

At 9:51 a.m., Mincoff informed Munoz that his "guy's here" and that he wanted to "knock [the transaction] out if not this afternoon, first thing in the morning." At 1:33 p.m., Mincoff pressured Munoz to complete the deal, "['c]ause these guys got ants in their pants, they're wanting to do it like right now." In a 7:00 p.m. call, Mincoff indicated that "nobody's gonna wait much longer" and that "[t]wo different guys came together and one of them is already bailing." He also said, "[w]e'll do three of them, I mean if uh. I mean I need to try and do them tonight. Like now." In an 8:18 p.m. call, Mincoff instructed Munoz that "we can do three (3) of em right now" and "[c]all me in the morning, I'll be here and I got my guys here right now."

July 28, 2005 Telephone Calls

During a call at 10:40 a.m., Mincoff told Munoz, "my guy is sitting right here and we need those . . . [h]e's got the paperwork for three (3), he's ready to roll." Munoz testified that he understood Mincoff to mean that his buyer had the money for three kilograms of cocaine. Munoz also understood that Mincoff was not purchasing the cocaine for his own use, but to fill the order placed by his customer. During a call at 1:28 p.m., Mincoff told Munoz "we're going to miss the boat" because "[t]his guy's got to leave." Mincoff directed Munoz to "lock on one for Tuesday, he's going to come back through . . . [j]ust for one (1)." According to Munoz, this portion of the conversation referred to there being "one more guy that wanted 1 kilo left."

Police Detective Barry Sweeney (Sweeney) was performing surveillance on Mincoff's residence on the morning of July 28, 2005. Sweeney noticed an individual exit and reenter the residence. This individual was later identified as David Laverne Lincoln (Lincoln). Lincoln was probably one of Mincoff's buyers, because Mincoff indicated that his buyer was from Northern California, and Lincoln subscribed to a telephone number in Day, a town in the northern half of the state. Additionally, telephone records indicated that there were nine calls between Lincoln and Mincoff on July 27, 2005, which corresponds to the dates that Mincoff discussed the cocaine sale with Munoz.

July 29, 2005 Telephone Call

Vega's friend Shadow contacted Munoz at 12:48 p.m. to ask, "did you still need that or not?" Munoz replied that, "they said not until Tuesday."

August 3, 2005 Telephone Call

The deal appeared to be on between Mincoff and Munoz as long as Munoz's supplier could bring the drugs down from Los Angeles. At 10:39 a.m., Mincoff stated, "Yeah, if they'll bring one down we'll do it."

August 4, 2005 Telephone Call

At 9:42 a.m., Munoz and Vega discussed whether the Engineer had "anything right now." In a 12:09 p.m. call, Munoz tells Mincoff that he will get back to him by 3:00 or 4:00 p.m. Munoz understood that the deal would take place if he obtained the cocaine. However, Munoz was not able to do so.

II. STANDARDS OF REVIEW

"We review de novo the district court's denial of a motion for judgment of acquittal based on insufficient evidence." *United States v. Dearing*, 504 F.3d 897, 900 (9th Cir. 2007) (citation omitted). "The evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citation, emphasis, and internal quotation marks omitted).

"Where the parties dispute whether the evidence supports a proposed instruction, we review a district court's rejection of the instruction for an abuse of discretion." *United States v. Bello-Bahena*, 411 F.3d 1083, 1089 (9th Cir. 2005) (citation omitted). When there is a "question whether the district court's instructions adequately presented the defendant's theory of the case," the "district court's denial of a proposed jury instruction" is reviewed de novo. *United States v. Somsamouth*, 352 F.3d 1271, 1274 (9th Cir. 2003) (citations and internal quotation marks omitted).

"The district court's application of the STA [Speedy Trial Act] is reviewed de novo, and its factual findings are reviewed for clear error." *United States v. Pete*, 525 F.3d 844, 848 n.3 (9th Cir. 2008) (citation omitted).

"We review de novo an asserted *Brady/Giglio* violation." *United States v. Blanco*, 392 F.3d 382, 387 (9th Cir. 2004) (citation omitted).

"We review a district court's denial of a motion to produce a witness' statement pursuant to the

Jencks Act for abuse of discretion." *United States v. Nash*, 115 F.3d 1431, 1440 (9th Cir. 1997) (citation omitted).

"Questions of statutory interpretation are reviewed de novo." *United States v. Youssef*, 547 F.3d 1090, 1093 (9th Cir. 2008) (citation omitted). "We review de novo whether a statute is unconstitutionally vague." *United States v. Wyatt*, 408 F.3d 1257, 1260 (9th Cir. 2005) (citation omitted).

III. DISCUSSION

A. Sufficiency of Evidence of Conspiracy

[1] "To establish a drug conspiracy, the government must prove: 1) an agreement to accomplish an illegal objective; and 2) the intent to commit the underlying offense." *United States v. Barragan*, 263 F.3d 919, 922 (9th Cir. 2001) (citation omitted). The government "can prove the existence of a conspiracy through circumstantial evidence that defendants acted together in pursuit of a common illegal goal." *United States v. Bishop*, 1 F.3d 910, 911 (9th Cir. 1993) (citation omitted). "Express agreement is not required; rather, agreement may be inferred from conduct." *United States v. Hegwood*, 977 F.2d 492, 497 (9th Cir. 1992) (citation omitted).

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that Mincoff entered into a conspiracy to distribute cocaine, rather than merely making or attempting to make a purchase.

1. The 2004 Completed Transaction

[2] Mincoff and Munoz agreed that Mincoff would

take the cocaine to his source and return with the money. This type of arrangement is known as "fronting." "Fronting is a sales technique in which some or all of the drugs being sold are provided before payment is required." *United States v. Ramirez-Robles* 386 F.3d 1234, 1242 n.2 (9th Cir. 2004) (internal quotation marks omitted).

[3] Although we have not specifically commented on the relationship between fronting and conspiracy, other circuits have credited evidence of fronting to establish a distribution conspiracy. In *United States v. Pruett*, 501 F.3d 976, 985-86 (8th Cir. 2007), *vacated on other grounds*, 128 S. Ct. 1473, 170 L. Ed. 2d 294 (2008), the Eighth Circuit concluded that a reasonable jury could have found Pruett to be a knowing member of a conspiracy to distribute methamphetamine when he both purchased and sold the drug, and fronted one-half ounce of it on at least one occasion.

Similarly, the evidence in *United States v. Beasley*, 2 F.3d 1551, 1560-61 (11th Cir. 1993), *as amended, cert. denied*, 512 U.S. 1240, 114 S. Ct. 2751, 129 L. Ed. 2d 869 (1994), was sufficient to sustain the defendant's conspiracy conviction where the defendant's supplier testified that the defendant purchased crack cocaine from him on several occasions and that the supplier sometimes fronted cocaine to the defendant.

2. The 2005 Planned Transaction

[4] Although the 2005 transaction was not completed because Munoz was unable to secure the cocaine for Mincoff's buyer, the recorded telephone calls reflect that Mincoff and Munoz planned to incorporate fronting into their second transaction.

In fact, Mincoff specifically asked Munoz to deliver the drugs directly to him to save time. In both the 2004 and 2005 transactions, the existence of a deferred payment arrangement supports the conclusion that Mincoff was engaged in a conspiracy to distribute cocaine. *See United States v. Johnson*, 437 F.3d 665, 676 (7th Cir. 2006) (noting that fronting demonstrated trust between the parties and was sufficient to establish that there was a "continuing and mutually profitable relationship to distribute drugs") (citation omitted). We are persuaded by precedent from our sister circuits that evidence of fronting may support a conviction for conspiracy to distribute a controlled substance. See *United States v. Bender*, 539 F.3d 449, 454 (7th Cir. 2008) ("[S]elling drugs on credit is especially indicative of a conspiracy because it gives the seller a stake in the buyer's successful resale of the drugs.") (citation omitted); see also *United States v. Pizano*, 421 F.3d 707, 719-20 (8th Cir. 2005) (relying on evidence of fronting over five-year period to uphold conviction for conspiracy to distribute).

3. The Buyer-Seller Rule

[5] The district court instructed the jury on Mincoff's theory that "[u]nder the controlling buy-sell law, there was no conspiracy to distribute cocaine." The jury was instructed that:

> The sale of narcotics, standing alone, does not establish a conspiracy to distribute narcotics; rather, the government must establish beyond a reasonable doubt that the buyer and seller in a narcotics transaction had an agreement to further distribute the narcotics in question.

> The sale of large quantities of narcotics, without more, is insufficient to establish an agreement between the buyer and seller to further distribute narcotics; however, the sale of large quantities of narcotics, in combination with other factors that indicate the buyer conspired with the seller to effect a further narcotics transaction, may be sufficient to establish a conspiracy to distribute narcotics.

The jury obviously did not adopt Mincoff's theory because it convicted him of one count of conspiracy to distribute cocaine.

[6] Viewing the evidence in the light most favorable to the government, a rational trier of fact could have found the buyer-seller rule inapplicable to the facts of this case. In *United States v. Lennick*, 18 F.3d 814, 819 (9th Cir. 1994), the defendant sold marijuana to friends for their personal use. There was no evidence that the friends "further distributed the marijuana" or that "Lennick sold them marijuana in a sufficient quantity to support an inference that they were going to further distribute it." *Id.* (citation omitted). Here, by contrast, Munoz sold Mincoff large quantities of cocaine that could support an inference of further distribution. Also, the recorded calls and Munoz's testimony revealed that both he and Mincoff were well aware that they were procuring the cocaine for Mincoff's buyers. Mincoff's conspiracy conviction was warranted because the evidence demonstrated an agreement to further distribute the cocaine, rather than the "mere purchase" of large quantities of drugs.

[7] The facts of *United States v. Thomas*, 284 F.3d 746 (7th Cir. 2002), on which Mincoff relies, are distinguishable for the same reason. *See Thomas*, 284 F.3d at 752-53 (noting the lack of an agreement between the buyer and seller). Munoz knew at all times that Mincoff was purchasing the cocaine for his customers. Munoz had a shared stake in Mincoff's illegal venture because he made $ 500 per kilogram of cocaine sold in 2004. Munoz was confident that he would make a similar profit on the 2005 deal. The fronting that occurred in 2004, and was to occur in 2005, demonstrated mutual trust between Munoz and Mincoff. Ultimately, if one looks at the "entire course of dealing" between Mincoff and Munoz, there is evidence that Munoz, unlike the defendant in *Thomas*, "shared with [Mincoff] a stake in the success of the retail sales to [Mincoff's] customers . . ." *Thomas*, 284 F.3d at 753.

4. Agreement on Essential Terms of the Planned 2005 Transaction

"A formal agreement is not necessary [for a conspiracy]; an agreement may be inferred from the appellants' acts pursuant to the scheme, or other circumstantial evidence." *United States v. Hopper*, 177 F.3d 824, 829 (9th Cir. 1999) (citation omitted).

Mincoff and Munoz agreed to the essential terms of the planned 2005 transaction. Mincoff initially ordered "maybe seven but six [kilograms] for sure." When the cocaine had not arrived by July 27, Mincoff's buyers grew impatient, and Mincoff reduced the order to three kilograms. Mincoff further reduced the cocaine order to one kilogram on July 28 because his buyers were leaving town.

The changing quantities of cocaine do not

necessarily indicate that there was no agreement on Mincoff's part. In the 2004 transaction, Mincoff ordered eight kilograms of cocaine for his buyer, but Munoz was only able to procure five. Mincoff accepted the reduced order, and retrieved the drugs within the hour.

Mincoff and Munoz also agreed on the price of the cocaine. Munoz sold Mincoff the cocaine for $ 15,500 per kilogram in 2004. The transcript of the recording indicates that Mincoff was expecting to pay about the same price per kilogram in 2005: "I just . . . assume [sic] do 'em with you if the numbers are right, because we didn't have any problem with 'em last time." Munoz also testified that he and Mincoff were set on the price of the cocaine, and that price was $ 15,500 per kilogram, the same price as in 2004.

Munoz confirmed his belief that there was an agreement between Mincoff and him to obtain cocaine and redistribute it to other individuals. Circumstantial evidence bolstered Munoz's belief. *See United States v. Williams*, 547 F.3d 1187, 1196-97 (9th Cir. 2008) (noting that the evidence was sufficient to establish that the defendants "acted together with a common goal") (citation omitted).

[8] In sum, the evidence was sufficient to establish that Mincoff was involved in a drug distribution conspiracy with Munoz and others. Evidence of the fronting arrangement, the intent to further distribute the cocaine, the shared stake in the success, and the agreement on essential terms of the 2005 planned transaction support the conspiracy conviction.

B. Sufficiency of Evidence of Attempt to Distribute a Controlled Substance

[9] "[A]n attempt conviction requires evidence that a defendant intended to violate the statute and took a substantial step toward completing the violation." *United States v. Meek*, 366 F.3d 705, 720 (9th Cir. 2004) (citations and internal quotation marks omitted). "To constitute a substantial step, a defendant's actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007) (citation and internal quotation marks omitted).

[10] Mincoff crossed the line between preparation and attempt during the 2005 planned transaction. Mincoff and Munoz discussed the details of Mincoff's order. Mincoff repeatedly asked Munoz whether they could "knock out" the deal "now." Mincoff did everything within his power to consummate the cocaine deal. His buyer, who was from Northern California, arrived in person to pick up the drugs in San Diego, and was present during some of the calls to Munoz. Munoz testified that he had no reason to believe that Mincoff did not intend to fully go through with the transaction. The only thing missing was the drugs, and Munoz asserted that finding the cocaine was all that remained to be done to complete the deal. The evidence demonstrates that Mincoff would have gone through with the narcotics sale and redistribution but for the independent circumstance that Munoz, his supplier, could not secure the drugs. Therefore, because he

did all he could to ensure the deal's completion, a rational trier of fact could have found that Mincoff attempted to distribute cocaine. *See United States v. Smith*, 962 F.2d 923, 930-31 (9th Cir. 1992) (explaining that there was sufficient evidence of an attempt where the defendant "committed all the steps necessary on his part.").

Citing *United States v. Yossunthorn*, 167 F.3d 1267, 1271-73 (9th Cir. 1999), Mincoff proposes that there were too many uncertainties in the 2005 planned transaction to constitute an attempt. However, *United States v. Hernandez-Franco*, 189 F.3d 1151, 1157 (9th Cir. 1999), explains that:

> *Yossunthorn* merely held that conducting countersurveillance activities to ensure the security of a meeting to make arrangements for some future drug purchase did not constitute a substantial step to sustain a conviction for attempted possession with intent to distribute heroin because too many steps remained for the crime to be completed.

(citation and internal quotation marks omitted). Here, as in *Hernandez-Franco*, "there was much less uncertainty," as the only task remaining was for Munoz to obtain the cocaine. *Id.* Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could conclude that Mincoff's conduct "was undertaken in accordance with a design to violate the statute." *Id.* (citation omitted).

C. Sufficiency of Evidence of Unlawful Use of a Communication Facility

[11] "In order to show a violation of section 843(b), the government must establish knowing and

intentional use of a communications facility, e.g., a telephone, to facilitate the commission of a narcotics offense." *United States v. Davis*, 960 F.2d 820, 827 (9th Cir. 1992) (citation, alterations, and internal quotation marks omitted). "The knowledge element of § 843(b) requires the government to prove that the defendant knowingly or intentionally used the communication device in order to aid or facilitate the underlying criminal violation." *United States v. Whitmore*, 24 F.3d 32, 35 (9th Cir. 1994) (citations and footnote reference omitted). "What is essential is that the defendant knows that he or she is using the communication device to facilitate the drug transaction." *Id.*

[12] There was sufficient evidence to support Mincoff's convictions under § 843. The recorded calls between Mincoff and Munoz, where price, quantity, and delivery were discussed, establish that Mincoff knowingly used a telephone to facilitate the distribution of cocaine. *See Davis*, 960 F.2d at 827 (concluding that direct and circumstantial evidence were sufficient to show that defendant used a telephone, or instructed another to use a telephone, to facilitate a drug deal).

Mincoff's reliance on *United States v. Rivera*, 775 F.2d 1559 (11th Cir. 1985), is unavailing because he went far beyond merely checking on the status of Munoz's efforts. *Cf. id.* at 1562 (noting that defendant made calls "simply to find out whether any sales had been made," not to facilitate the sales). In contrast, Mincoff urged Munoz to find a drug source for the willing buyers Mincoff had lined up. The only task remaining was to procure the cocaine.

D. Mincoff's Requested Multiple Conspiracies Instruction

"A multiple conspiracies instruction is generally required where the indictment charges several defendants with one overall conspiracy . . . ." *United States v. Anguiano*, 873 F.2d 1314, 1317 (9th Cir. 1989). "Evidence sufficient to support a multiple conspiracies instruction is present where a jury could reasonably conclude that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment." *United States v. Fernandez*, 388 F.3d 1199, 1247 (9th Cir. 2004) (citation, emphasis, and internal quotation marks omitted).

[13] The district court properly denied Mincoff's request for a multiple conspiracies jury instruction. Mincoff's theory that the presence of subagreements among himself and Munoz, Munoz and his suppliers, and himself and his buyers warranted a multiple conspiracies instruction, is unconvincing. It is irrelevant that Munoz's suppliers and Mincoff's buyers did not know each other or may not have been aware of every act committed in furtherance of the conspiracy, because "[a] single conspiracy can include subgroups or subagreements . . ." *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996), as amended. It is sufficient that the government proved that Mincoff "was involved in a broad project to distribute cocaine and that his benefit depended on the success of the operation." *United States v. Shabani*, 48 F.3d 401, 403 (9th Cir. 1995), as amended (citation omitted).

E. Mincoff's Requested Attempt Instruction

Mincoff contends that the district court erred when it declined to give his requested instruction that there is no attempt to distribute simply from negotiations with a known drug dealer. He argues that the actual instruction given "opened a wider pathway to conviction to which the government was unentitled."

"In reviewing jury instructions, the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury's deliberation." *United States v. Cherer*, 513 F.3d 1150, 1154 (9th Cir. 2008) (citation omitted). "The trial court has substantial latitude so long as its instructions fairly and adequately cover the issues presented." *Id.* (citation and alteration omitted).

[14] The attempt instruction was not misleading or inadequate to guide the jury's deliberation. It read:

> A substantial step towards the commission of the crime of distribution of cocaine requires more than mere preparation. Merely initiating a transaction with a known drug supplier, without more, is not sufficient. In evaluating whether a substantial step toward the commission of the crime of distribution of cocaine has been taken, you may consider the nature and scope of the negotiations between a buyer and seller, as well as all other circumstances relating to the commission of the alleged crime.

This instruction tracks the language in *Yossunthorn*, which stated:

> When key elements of the drug deal are incomplete, making an appointment with a known drug supplier, even one who has previously fronted drugs to the defendant at a fixed price, is . . . not of itself such a commitment to an intended crime as to constitute an attempt, even though it may make a later attempt possible.

167 F.3d at 1272-73 (citation and internal quotation marks omitted). The district court also provided an instruction that tracks Ninth Circuit Model Criminal Jury Instruction on attempt:[2]

> The defendant is charged in Count 2 of the superseding indictment with attempted distribution of cocaine in violation of Sections 841(a)(1) and 846 of Title 21 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: First, the defendant intended to deliver cocaine to another person; Second, the defendant knew it was cocaine or some other prohibited drug;

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[2] The text of Ninth Circuit Model Criminal Instruction 5.3 (2003) reads: "The defendant is charged in the indictment with attempting to commit [*crime charged*]. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: First, the defendant intended to commit [*crime charged*]; and Second, the defendant did something which was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step. It is a crime to commit [*crime charged*]. Mere preparation is not a substantial step toward the commission of the [*crime charged*].

> and Third, the defendant did something that was a substantial step toward committing the crime, with all of you agreeing as to what constituted the substantial step. Mere preparation is not a substantial step toward the commission of the crime of distribution of cocaine.

Because the instructions addressing attempt tracked the language of *Yossunthorn* and the Ninth Circuit Model Criminal Instruction, they adequately informed the jury of the requirements for conviction on the charge of attempt to distribute cocaine.

F. Constructive Amendment of the Indictment

Mincoff contends that the indictment was constructively amended because the government's charge did not match the proof offered at trial. Essentially, he argues that a conspiracy to distribute cocaine requires proof that one possessed that cocaine. Mincoff theorizes that the indictment implicitly charged possession of cocaine by charging conspiracy to distribute cocaine. Because the government did not prove that he possessed cocaine, Mincoff accuses the government of charging one thing and proving another.

"A constructive amendment involves a change, whether literal or in effect, in the terms of the indictment." *United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002) (citation and internal quotation marks omitted). A constructive amendment requires reversal and occurs where "(1) there is a complex of facts presented at trial distinctly different from those set forth in the charging instrument, or (2) the crime charged in the indictment was substantially altered at trial, so that

it was impossible to know whether the grand jury would have indicted for the crime actually proved." *Id.* at 615 (citations, alterations, and internal quotation marks omitted).

The Superseding Indictment charged Mincoff with "knowingly and intentionally conspir[ing] . . . to distribute 5 kilograms and more of cocaine . . ." The proof at trial, including Munoz's testimony and the recorded telephone calls, establish that Mincoff ordered large quantities of cocaine from Munoz with the intent to further distribute the cocaine to Mincoff's buyers. Nevertheless, Mincoff contends that the government did not prove the charges in the indictment, because there was no proof that he possessed cocaine.

Although we have not yet ruled on this precise issue, other circuits have rejected the argument that possession is a necessary element of the crime of conspiracy to distribute narcotics. *See, e.g., United States v. Osuna-Zepeda*, 416 F.3d 838, 843 (8th Cir. 2005) ("Possession of the narcotic is not a necessary element of the crime of conspiracy to distribute.") (citations omitted); *United States v. Colon*, 268 F.3d 367, 377 (6th Cir. 2001) ("[I]t is possible to commit the distribution element of the crime without possessing the drugs themselves.") (internal quotation marks omitted); *United States v. Jackson*, 213 F.3d 1269, 1297 (10th Cir.), *vacated on other grounds*, 531 U.S. 1033, 121 S. Ct. 621, 148 L. Ed. 2d 531 (2000) ("Although it may be unusual for a person to distribute a controlled substance without at least momentarily possessing the controlled substance, it is not impossible.") (citations omitted); *United States v. Sepulveda*, 102 F.3d 1313, 1317

(1st Cir. 1996) ("While possession is certainly helpful in proving distribution, it is technically not a necessary element.") (citations and internal quotation marks omitted); *United States v. Barrientos*, 758 F.2d 1152, 1158 (7th Cir. 1985) (same).

[15] We adopt the rule articulated by our sister circuits that a narcotics distribution charge may be proven without proof of possession. This conclusion is consistent with the general law of conspiracy--that the conspiracy is complete once agreement is reached and an overt act is committed by either conspirator to further the agreement. *See United States v. Bosch*, 914 F.2d 1239, 1241 (9th Cir. 1990) ("The conspiracy was complete when the conspirators had agreed to commit the offense and one of them had done an overt act in furtherance of the agreement. The accomplishment of the conspiracy's goal is immaterial . . .") (citation omitted). To hold otherwise would create a loophole allowing drug conspirators to dodge conviction by avoiding possession of the drugs that formed the very basis of the conspiracy. Because the evidence proved the conspiracy charge in the Superseding Indictment, Mincoff's argument that the indictment was constructively amended fails.

G. Speedy Trial Ruling

"The Speedy Trial Act, 18 U.S.C. § 3161, sets forth those trial delays which shall be excluded in computing the time within which a defendant's trial must commence." *United States v. Aviles-Alvarez*, 868 F.2d 1108, 1111 (9th Cir. 1989). "A continuance will result in excludable delay only if the continuance is based on the district court's findings

that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *Id.* at 1112 (citation and internal quotation marks omitted).

The district court's factual findings and conclusion that the ends of justice supported exclusion of time in this case were not clearly erroneous. Mincoff and three codefendants were indicted on June 6, 2006. On August 22, 2006, the district court made oral and written findings that this case was "unusually complex" and excluded time under the STA from August 16, 2006 to October 11, 2006. Pursuant to other factual findings, the district court also excluded time from October 11, 2006 to November 29, 2006; November 29, 2006 to March 14, 2007; March 14, 2007 to June 27, 2007; and June 27, 2007 to August 3, 2007.

[16] Each of the factual findings described how this case was related to five other cases pending before the district court by way of common evidence and common defendants, with a total of thirty-four individuals before the district court. Two of the four individuals originally charged in this case were also charged with a RICO conspiracy that presented "novel questions of fact and law." The findings related that as of June 29, 2007, the Government has produced in discovery approximately 48,000 pages of written material, 130 compact disks, 4 digital video disks, 17 video tape recordings and 15 audio cassette tapes. The compact disks contain, among other things, approximately 30,000 intercepted telephone calls and approximately 31,400 pages of line sheets which correspond to those calls.

These findings complied with *Aviles-Alvarez*. The exclusions were specifically limited in time and justified with reference to the facts as of the time the delay was ordered.

H. The Government's Obligations Under *Brady*, *Giglio*, and the Jencks Act

1. Brady/Giglio

Brady requires the government to disclose "any evidence favorable to Defendants material to their guilt or innocence." *United States v. Chapman*, 524 F.3d 1073, 1078 (9th Cir. 2008). Giglio requires that the government disclose "any promises, inducements, or threats made to witnesses to gain cooperation in the investigation or prosecution." Id.

"The three elements of a *Brady* violation are: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *United States v. Williams*, 547 F.3d 1187, 1202 (9th Cir. 2009) (citation, alteration, and internal quotation marks omitted). "Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Jackson v. Brown*, 513 F.3d 1057, 1071 (9th Cir. 2008) (citation and internal quotation marks omitted).

[17] The district court properly denied Mincoff's motions for *Brady/Giglio* material. Mincoff requested any untruthful or incomplete information or testimony in addition to the notes taken during FBI interviews of Munoz. However, Mincoff

concedes that the government informed him of Munoz's contradictory statement regarding the reduction of the 2004 cocaine order from eight to five kilograms. Aside from this contradiction, Mincoff has not identified any potentially exculpatory evidence that was not disclosed to him. Mincoff's "mere speculation about materials in the government's files" did not require the district court to make those materials available, or mandate an in camera inspection. *United States v. Michaels*, 796 F.2d 1112, 1116 (9th Cir. 1986).

2. Jencks Act

"The Jencks Act[3] 3 mandates that after a witness called by the United States testifies on direct, the United States must, on motion by the defendant, produce any statement of the witness in the possession of the United States that relates to the subject matter testified to by the witness." *United States v. Riley*, 189 F.3d 802, 805 (9th Cir. 1999) (citation omitted). The term "statement" means "a written statement made by said [government] witness and signed or otherwise adopted or approved by him," or "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement." *United States v. Ogbuehi*, 18 F.3d 807, 810 n.1 (9th Cir. 1994) (citation and alteration omitted).

[18] The district court did not abuse its discretion when it found that the interview notes were not Jencks Act material. Although notes were taken by

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[3] 18 U.S.C. § 3500.

FBI agents during the interviews with Munoz, nothing in the record suggests that the notes amount to substantially verbatim recitals of Munoz's oral statements. Further, the agents never read any of these notes back to Munoz and there is nothing to indicate that Munoz "signed or otherwise adopted or approved" the notes as his own statements. Thus, the notes cannot be considered substantially verbatim recitals of Munoz's oral statements that were adopted by him. "A government agent's rough notes will not be Jencks Act statements when they are not complete, are truncated in nature, or have become an unsiftable mix of witness testimony, investigator's selections, interpretations, and interpolations." *United States v. Simtob*, 901 F.2d 799, 809 (9th Cir. 1990) (citation and internal quotation marks omitted). The district court correctly determined that the interview notes were not subject to production under the Jencks Act.

I. The Sentence Enhancement

1. Felony Drug Offense

Mincoff contends that the district court erred by doubling the minimum mandatory sentence on Counts 1 and 2 from ten to twenty years and on Counts 3 and 4 from four to eight years. The double penalties apply only if Mincoff's 1990 conviction for possession of a listed chemical with intent to manufacture methamphetamine is a "felony drug offense."

"Federal law imposes a mandatory minimum sentence for certain crimes, but only if the defendant has a felony drug prior. In order to render defendant eligible for the mandatory minimum, the government must allege the prior conviction in an

information pursuant to 21 U.S.C. § 851." *United States v. Severino*, 316 F.3d 939, 941 (9th Cir. 2003) (en banc). "The term felony drug offense means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44) (internal quotation marks omitted).[4] Ephedrine can be used as a precursor chemical to manufacture methamphetamine. See United States v. Lo, 447 F.3d 1212, 1224 n.6 (9th Cir. 2006).

Mincoff's prior offense is a felony drug offense. On October 18, 1990, Mincoff was found guilty of possession of a listed chemical (ephedrine) with the intent to manufacture methamphetamine in violation of 21 U.S.C. §§ 841(d)(1) and 802(34)(C). Mincoff was sentenced to 120 months' imprisonment, but his sentence was reduced to 57 months.

[19] The government filed an information and notice to seek enhanced penalties. As a result, Mincoff's expert filed a declaration stating that ephedrine is not a narcotic drug, marihuana, anabolic steroid, or depressant or stimulant substance. However, methamphetamine falls within the definition of a stimulant substance as defined by

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[4] The United States Supreme Court recently determined that § 802(44) provides the exclusive definition of a "felony drug offense." *Burgess v. United States*, 128 S.Ct. 1572, 1577, 170 L. Ed. 2d 478 (2008).

21 U.S.C. § 802(9)(B).[5] *See United States v. Ward*, 63 F. Supp. 2d 1203, 1207 n.4 (C.D. Cal. 1999) (citation and internal quotation marks omitted); *see also Metabolife International, Inc. v. Wornick*, 264 F.3d 832, 849 (9th Cir. 2001) (recognizing ephedrine as a stimulant). Therefore, Mincoff's possession of ephedrine was conduct relating to the stimulant substance of methamphetamine, resulting in a conviction qualifying as a felony drug offense. See *United States v. Hollis*, 490 F.3d 1149, 1157 (9th Cir. 2007) ("To determine whether a prior conviction qualifies as a drug trafficking offense, we look only to the fact of conviction and the statutory definition of the prior offense.") (citation omitted).

2. Constitutionality of 21 U.S.C. § 841(b)

Mincoff contends that the term "felony drug offense" as used in 21 U.S.C. § 841(b) is vague as applied to his prior conviction of possession of ephedrine with intent to manufacture methamphetamine.

"A law is unconstitutionally vague if it fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 554 (9th Cir. 2004), as amended (citations omitted).

[5] "The term depressant or stimulant substance means . . . (B) a drug which contains any quantity of (i) amphetamine or any of its optical isomers; (ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (iii) any substance which the Attorney General, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system . . ." 21 U.S.C. § 802(9)(B) (internal quotation marks omitted).

[20] Section 841 is constitutional as applied to Mincoff. In *United States v. Van Winrow*, 951 F.2d 1069, 1072 (9th Cir. 1991), we rejected a claim that the definition of a "felony drug offense" was unconstitutionally vague as applied to a defendant with prior felony convictions for cocaine possession. Mincoff attempts to distinguish his case from *Van Winrow* on the basis that the phrase "conduct relating to a felony drug offense" is vague as applied to his prior conviction of possession of ephedrine with intent to manufacture methamphetamine, as ephedrine itself is not a stimulant. This argument is unconvincing because a reasonable person would know that possession of ephedrine with intent to use it in manufacturing methamphetamine is conduct relating to a felony drug offense of methamphetamine production.

Contrary to Mincoff's view, the rule of lenity does not apply because the statute is not ambiguous. Accordingly, there is no need to construe § 841 in Mincoff's favor. *See United States v. Hoyt*, 879 F.2d 505, 511-12 (9th Cir. 1989), *as amended* (citations omitted).

IV. CONCLUSION

We affirm Mincoff's conviction and sentence. The evidence was sufficient to sustain the convictions for conspiracy to distribute cocaine, attempt to distribute a controlled substance, and use of a communication facility. There was no abuse of discretion in declining to give a multiple conspiracies instruction or an instruction stating that negotiating with a known drug dealer is not sufficient proof of an attempt to distribute. There was no Speedy Trial Act violation, no *Brady/Giglio*

violation, and no Jencks Act violation. The penalty enhancement was not vague as applied.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v.	No. 08-50058 D.C. No. CR-06-01241-DMS-3
JAMES MINCOFF, aka Jim, Defendant-Appellant.	Southern District of California, San Diego
	ORDER

Filed Sept 08, 2009

Before: CANBY, RAWLINSON and N.R. SMITH, Circuit Judges.

The panel voted to deny the Petition for Rehearing. Judges Rawlinson and N.R. Smith voted, and Judge Canby recommended, to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion for Rehearing En Banc, and no judge of the court has requested a vote.

Appellant's Petition for Rehearing filed on August 12, 2009, is DENIED, and the Suggestion for Rehearing En Banc is REJECTED.